IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.

APPEAL NO.1202 OF 1997
IN
ARBITRATION PETITION NO.79 OF 1997
IN
AWARD NO. 32 OF 1997

Oil and Natural Gas Corporation Ltd.
incorporated under the Indian Companies
Act, 1956 having its Registered Office
at Tel Bhavan, Dehra Dun and Branch
Office at 5/A, Vasundhara Bhavan,
Ali Yawar Jung Marg, Bandra (East),
Mumbai-400 051. ...Appellant.

Vs.

Dai Ichi Karkaria Ltd.
a company incorporated under the
Indian Companies Act, 1956 having
its Registered Office at Liberty
Building, Sir Vithaldas Thackersey Marg,
Mumbai-400 020. ...Respondent.

....

Shri D. R. Zaiwala, Senior Advocate with Shri S. N. Naik i/b. Little & Co. for the Appellant.
Shri D. D. Madon, Senior Advocate with Shri Burjess Colabawalla i/b. M/s. Amarchand & Mangaldas & Suresh A. Shroff & Co. for the Respondent.

.....

CORAM : R. M. S.KHANDEPARKAR &
DR.D.Y.CHANDRACHUD, JJ.

February 22, 2007.

JUDGMENT (PER DR. D.Y. CHANDRACHUD, J.):

I

An Arbitration Petition was instituted by the Oil and Natural Gas Corporation Ltd (ONGC) under Section 30 of the Arbitration Act, 1940, in order to challenge an award of a sole Arbitrator. The Arbitration Petition was dismissed by a Learned Single Judge on 1st October 1997. ONGC is in appeal. At the hearing of the appeal, submissions have been confined to four grounds of challenge, these being:

(i) The Arbitrator adjudicated upon matters excepted from the arbitration clause and assumed jurisdiction where he had none; (ii) The award is contrary to contractual provisions; (iii) There was an error apparent on the face of the record by the Arbitrator in rejecting the claim for liquidated damages as not proved; and (iv) The award of interest is contrary to the provisions of the contract. Upon hearing Counsel for the parties, our conclusion is that there is no merit in the challenge and the appeal must fail.

II

2. ONGC is a Public Sector Undertaking which engages in oil exploration, and in the development, production and treatment

of oil and natural gas. The Respondent (DIK) is a Company incorporated under the Companies' Act, 1956 and carries on the business of the manufacture and supply of chemicals. In pursuance of a bid submitted by DIK, in response to global tenders floated by ONGC, an order was placed by ONGC on 2nd April 1988 upon DIK for the supply of 2450 MT of "Daitrolite MNF – 1206", which is a pour point depressant ("PPD"). PPD is a chemical additive that is used to decrease the viscosity and increase the fluidity of crude oil in order to facilitate the process of pumping oil through a pipeline. The pour point is the lowest temperature at which oil or other liquid will pour, without excessive amounts of wax crystals forming and so preventing the flow. The quantity of PPD for which the order was placed by ONGC upon DIK was to be used by ONGC in its pipeline at Bombay High.

The contract.

3. The Supply Order contained the terms and conditions of contract:

(i) Under Clause 6 of the order, a quantity between 450 and 500 MT was to be supplied in September 1988 followed by a similar quantity every month so as to complete supplies by

February 1989.

(ii) Under Clause 8(a), DIK was to effect free delivery in ONGC's Godown at Nhava after sampling/bonding and testing, including loopline testing and acceptance after debonding by ONGC. Under Clause 8(c), the material was to be despatched only after “satisfactory laboratory test and loopline test and approval and debonding by ONGC”.

(iii) Clause 10 of the Supply Order provided that the material would be (i) Sampled/bonded by ONGC and a random sample would be drawn (the “reference sample”); (ii) From the reference sample, 50 litres would be tested in ONGC's Laboratory; (iii) From the reference sample, 50 litres would be tested on the loopline at the BHS platform for pour point, plastic viscosity and yield value; and (iv) If the 50 litres' sample met the specifications of the order, the material would be debonded for despatch to the Nhava Godown.

(iv) Clause 13 of the Supply Order provided that the PPD is guaranteed to achieve a pour point of 18 degrees centigrade at

350 parts per million (“ppm”) at the BHS platform. The other parameters of the specifications were contained in Annexure-A to the order. In the event that the dosage required in the loopline were to exceed 350 ppm to achieve the specified parameters of the order, the supplier was to compensate ONGC for the corresponding excess quantity of PPD required by paying to ONGC the price of such excess quantity of PPD or supplying such excess quantity of PPD. DIK was also required to furnish a performance guarantee amounting to 10% of the value of the order (Rs.8,19,10,850/-) and a Bank Guarantee of 2.5% as security deposit.

(v) Clause 17 of the Supply Order contained “Special instructions/conditions” and sub-clause (ii) thereof provided as follows:

> “(ii) If the material sampled/bonded is found below specifications on test, it will be at the option of ONGC to reject full or part of the material or accept the same at reduced rate. Decision of ONGC in this regard will be final and binding on the Contractor.”

By Clause 17(vii), the delivery schedule was inclusive of 17 days' time required for sampling/bonding, testing (including loopline

testing), and debonding by ONGC. Time in excess of 17 days for the aforesaid exercise was to be to ONGC's account.

(vi) By Clause 20, parties stipulated that in the event of a delay in supply, ONGC would be entitled to recover from DIK "as agreed, liquidated damages and not by way of penalty, a sum equivalent to ½% of the price" of any stores which the contractor has failed to deliver within the period fixed for each week or part thereof during which the delivery of such stores may be in arrears "upto a ceiling of 5% of the cost of any stores".

(vii) Clause 26 provided for arbitration and in so far as is material, was to the following effect:

> "26. Arbitration:
>
> Except where otherwise provided in the supply order/contract all questions and disputes, relating to the meaning of the specifications, and instructions herein before mentioned and also to the quality of workmanship of the item(s) ordered or as to any other question, claim or thing whatsoever, in any way, arising out of or relating to the supply order/contract, specifications, instructions or these conditions or otherwise concerning the materials or the execution or failure to execute the same during stipulated/extended period or after completion or abandonment thereof shall be referred to the sole arbitration of the person appointed by Member of the Commission at the time of the dispute".

(viii) Clause 27 provided for Withholding and Lien in respect of sums claimed. The clause provided that whenever any claim for payment of money arises against DIK, ONGC "shall be entitled to withhold and also have a lien to retain such sum or sums in whole or in part from the security deposit/performance bond, if any, deposited by the Contractor and for the purpose aforesaid, the commission shall be entitled to withhold the said security deposit/performance bond, if any, furnished, as the case may be and also have a lien over the sums pending finalisation or adjudication of any such claim." The clause provided that the "Contractor will have no claim for interest or damages whatsoever on any account in respect of such withholding or retention under the lien".

(ix) Clause 5 of Annexure-A to the Supply Order as amended, provided the method for the evaluation of performance and for the working out of compensation, if any, for substandard quality. In so far as is material, the clause provided as follows:

> "In order to establish consistency of quality of product supplied, 1 MT out of the first lot supplied to ONGC against the present order would be retained separately by ONGC at its store as a reference sample."

The performance of subsequent lots was required to be judged by comparing the results achieved by the reference sample on the loopline test. If the comparison showed any deterioration in performance, the compensation leviable was to be based on the difference between the results of the reference sample and the subsequent lot in question, plus compensation, if any, applicable to the reference sample.

(x) Clause 6 of Annexure-A stipulated that the reference sample will be prepared by drawing one barrel at random from each batch of the first lot offered for sampling and bonding which will be repacked and separately marked as a reference sample at ONGC's stores.

The Dispute:

4. Disputes arose between the parties. DIK says that it has supplied the full quantity of PPD ordered within the time line

specified by the Supply Order, but that it was ONGC which failed to debond the material in a timely manner. According to DIK, ONGC failed to conduct a loopline test as specified in the Supply Order. On the other hand, it was ONGC's case that there was a late delivery of the material by DIK and that the material was not in accordance with the specifications and quality agreed upon in the Supply Order. As a result, ONGC asserts that it had to utilise additional amounts of PPD to achieve the same result. ONGC (i) claimed liquidated damages for late delivery of the material; (ii) claimed compensation for the additional PPD that was alleged to have been utilised; and (iii) deducted sums of money from amounts payable to DIK on the ground of liquidated damages and compensation. Additional Bank Guarantees were furnished by DIK against which ONGC released amounts due to DIK under the Supply Order.

Arbitration:

5. DIK invoked the arbitration clause by its letter dated 15th November 1990. The disputes between the parties were referred to Mr.Justice B.J. Divan, former Judge of the Gujarat High Court, as Sole Arbitrator. The Arbitrator declared his award on 30th

January 1997. By his award, the Arbitrator held that (i) The disputes between the parties were arbitrable and that the claim raised by ONGC did not fall within the excepted matters contained in the Supply Order; (ii) DIK had entered into the contract with full knowledge of the deficiencies, from a scientific point of view, of the loopline test and it was hence not open for DIK to contend that the loopline test was unscientific or incapable of yielding accurate results; (iii) The loopline test carried out by ONGC was not in accordance with the procedure laid down in Supply Order inasmuch as although a reference sample was required to be drawn and maintained, the reference sample was not used for the loopline test; (iv) Despite having stated in response to interrogatories that details of the actual dosage of PPD supplied by DIK and the quantity used on the main line would be made available at the final hearing of the arbitration, ONGC had not led any evidence regarding actual user of the PPD supplied by DIK under the contract; (v) In view of the failure of ONGC to lead evidence regarding the actual dosage of PPD used on the main line, ONGC was not entitled to claim any compensation from DIK for the extra dosage of PPD alleged to have been used. The amount deducted by ONGC as compensation for such alleged

additional dosage would have to be paid over; (vi) By implied mutual consent, time for delivery was extended by the parties. The long time taken between the bonding of each lot and debonding was entirely due to the stand taken up by ONGC that the loopline test had to be carried out as provided in the contract and that extra dosage had to be used on the main line because of what was found at the time when the test was conducted on each lot. Since ONGC failed to prove the case that extra dosage had been used in respect of each of the seven lots, the question of late delivery did not survive. Moreover, ONGC failed to establish that it has suffered any loss owing to alleged late delivery and hence it was not entitled to deduct any amount from the outstandings of DIK; (vii) There was no reason for ONGC to avail of the Bank Guarantee and DIK was entitled to claim Bank commission and charges thereon.

6. Under the arbitral award, DIK was held to be entitled to the following amounts from ONGC: (a) Rs.59,40,718/- wrongfully deducted on account of PPD; (b) Rs.32,82,680/- deducted as liquidated damages for alleged late delivery; (c) Rs.7,81,153/- towards Bank commission and charges for the Bank Guarantee;

(d) interest computed at the rate of 18% p.a. on the aforesaid amount; and (e) Rs.67,175/- being 75% of the costs of the Arbitrator in the arbitration.

The Arbitration Petition: the Judgment of the Single Judge:

7. In an Arbitration Petition filed under Section 30 of the Arbitration Act, 1940, ONGC challenged the award before this Court. By a judgment dated 1st October 1997, the Learned Single Judge upheld the award and accordingly a decree was drawn up in terms of the award on 27th October 1997. By an order dated 13th February 1998, a Division Bench while admitting the appeal, granted a stay on the execution of the decree conditional on ONGC depositing an amount of Rs. 2.30 crores. DIK was permitted to withdraw the amount on furnishing a Bank Guarantee. DIK has withdrawn the decretal amount and the Court has been informed that a Bank Guarantee had been furnished as directed by the Court, pending the hearing and final disposal of the appeal.

III

The Challenge :

8. The challenge by ONGC has, in the course of the

submissions urged at the hearing of the appeal, been confined to the following four grounds:

(i) The Arbitrator, it has been urged, erred in assuming jurisdiction on matters which were excepted from the scope of the arbitration clause. ONGC's submission is that the finality provided under clause 17(ii) of the Special Conditions will extend to the question as to whether the material that was sampled/bonded is below the specifications on test as well as in regard to the option of ONGC to reject in full or in part, the material supplied or to accept the material at a reduced rate. Alternatively, ONGC urges that during the course of the contract, DIK had asked for joint testing in respect of the PPD that was supplied and agreed to be bound by the results of the joint test. Following this, it was submitted that DIK had quantified the loss suffered on account of dosage variation at Rs.35 lakhs; (ii) The award of the Arbitrator is contrary to the terms of the contract which would necessitate the interference of the Court on the ground of an error apparent on the face of the record; (iii) The Arbitrator erred in rejecting the deduction of liquidated damages on the ground that it was not proved. Parties, it was urged, provided in clause 20 of the Contract, a genuine pre-estimate of damages and the principles

enunciated by the Supreme Court in the judgment in **Oil & Natural Gas Corporation vs. Saw Pipes** [1] will apply; and (iv) The award of interest is contrary to the provisions of Clause 27 of the Contract.

9. On behalf of DIK, it has been submitted that (i) A Petition under Section 30 of the Arbitration Act, 1940 is neither an appeal on facts, nor on law and the jurisdiction of the Court extends to determine whether the Arbitrator had committed an error apparent on the face of the record; (ii) In the exercise of the jurisdiction, it is neither open to the Court to reappreciate the evidence nor to reappreciate the material on record before the Arbitrator, the Arbitrator being the sole Judge of the quality and the quantity of the evidence before him; (iii) Clause 17(ii) of the Special Conditions does not enunciate a blanket ban to a challenge against any decision by ONGC. Under the clause, it is only the decision of ONGC to reject in full or part, the PPD supplied or to accept the same at a reduced rate that is rendered final. In other words, the decision of ONGC in regard to the exercise of the aforesaid option is final, but not on the question as to whether the material passed

1 2003 (5) SCC 705

the contractual specifications after the loopline test; (iv) The Arbitrator has entered a finding of fact on an appreciation of evidence that the loopline test was not correctly carried out in accordance with the terms of the contract. This finding cannot be assailed either in the petition or in appeal and as a matter of fact, no such challenge was advanced in the Arbitration Petition; (v) On the issue of liquidated damages, the requirement of Clause 20 is that there should be a delay in supplies. However, in the present case, the finding of fact is that delivery was effected within time since time for making delivery was extended by mutual consent. This is a matter of appreciation of evidence and as a matter of fact, there is no challenge to the finding of the Arbitrator in the Arbitration Petition. There being no late delivery, there could be no question of damages; (vi) Though ONGC stated before the Arbitrator that it had in its possession evidence to prove extra dosage of PPD required, the relevant material was neither produced nor proved. The finding of the Arbitrator that ONGC failed to lead evidence on the actual extra dosage of PPD used is correct and does not warrant interference; (vii) The Arbitrator has correctly followed the decision of the Supreme Court in **Maula**

Bux v. Union of India [2] and the decision in **Saw Pipes** (supra) would not lead to a different conclusion; and (viii) On the question of interest, the Learned Single Judge was justified in coming to the conclusion that the challenge could not be entertained in the absence of even a ground in the Arbitration Petition.

IV

Parameters of the challenge under Section 30 of the Arbitration Act, 1940:

10. The Learned Single Judge was dealing with a challenge to an arbitral award under Section 30 of the Arbitration Act, 1940. Under Section 30, an award could not be set aside except on one or more of the following grounds, namely, that (i) The Arbitrator has misconducted himself or the proceedings; (ii) The award has been made after the issuance of an order by the Court superseding the arbitration or after proceedings had become invalid under Section 35; and (iii) The award has been improperly procured or is otherwise invalid. An arbitral award is a decision of a domestic Tribunal chosen by the parties to facilitate arbitration. In the **Union of India vs. Rallia Ram**,[3] the Supreme Court held that the

2 AIR 1970 SC 1955
3 AIR 1963 SC 1685

Civil Courts which are entrusted with the power to facilitate arbitration and to effectuate arbitral awards, cannot exercise appellate powers over the decision. The interference of the Court cannot be justified merely on the ground that the Judge perceives the decision to be wrong, but only where an error of law appears on the face of the award. That test postulates that there is in the award or a document actually incorporated thereto some legal proposition which is the basis of the award and which can then be said to be erroneous:

> "Wrong or right the decision is binding if it be reached fairly after giving adequate opportunity to the parties to place their grievances in the manner provided by the arbitration agreement. But it is now firmly established that an award is bad on the ground of error of law on the face of it, when in the award itself or in a document actually incorporated in it, there is found some legal proposition which is the basis of the award and which is erroneous. An error in law on the face of the award means: "you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a 'reference is made to a contention of one party, that opens the door to setting first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound": **Champsey Bhara and Co. v. Jivraj Balloo Spinning and Weaving Co., Ltd., 50 Ind App 324 : (AIR 1923 PC 66)**."

However, where a question of law is specifically referred to the Arbitrator for a decision, the award of the Arbitrator is binding on the parties for, by referring a specific question, the parties evince an intention to have a decision of the Arbitrator rather than from the Court. In such a case, the Court would not interfere unless it is satisfied that the Arbitrator has proceeded illegally.

11. This statement of law governing the ambit of a challenge under Section 30 of the Arbitration Act, 1940 has consistently been followed in subsequent decisions. Later decisions expound upon the doctrine of error apparent and define the ambit of the jurisdiction of a reviewing Court. The propositions of law which emerge from those decisions can now be briefly summarised:

(i) A Court while examining the objections taken to an award filed by an Arbitrator is not required to examine the correctness of the claim on merits with reference to the materials produced before the Arbitrator. The Court cannot sit in appeal over the views of the Arbitrator by re-examining and re-assessing the material; [4]

4 Puri Construction Pvt. Ltd. v. Union of India, AIR 1989 SC 777 (paras 13 & 14 at pages 782 and 783).

(ii) The Arbitrator is constituted by the parties to be a final arbiter of the disputes between them and the award is not open to challenge on the ground merely that the Arbitrator has reached a wrong conclusion or that he has failed to appreciate facts; [5]

(iii) If there is no legal proposition either in the award or in any document annexed to the award which is erroneous and which constitutes the basis of the award and the alleged mistakes or errors are only mistakes of fact, the award is not amenable to correction by the Court;[6]

(iv) Even assuming that there is an error of construction of an agreement, or an error in law in arriving at a conclusion, such an error is not an error which is amenable to correction in a reasoned award. In order to set aside an award, there must be a wrong proposition of law laid down in the award which constitutes the basis of the award;[7]

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5 Hindustan Tea Co. v. K.Shashikant & Co., AIR 1987 SC 81 (para 2 at page 82)
6 Jawaharlal Wadhwa v. Haripada Chakroberty, AIR 1989 SC 606 (para 6 at page 610)
7 U.P. Hotels v. U.P. State Electricity Board, AIR 1989 SC 268 (paras 17 & 19 at pages 274 and 275)

(v) The reasonableness of the reasons furnished by the Arbitrator in making his award cannot be challenged. The fact that on the same evidence, a Court might have arrived at a conclusion different from the one arrived at by the Arbitrator is by itself no ground for setting aside the award;[8]

(vi) The application of the error apparent on the face of the record test does not empower the Court exercising jurisdiction under Section 30 to substitute the scrutiny by the Arbitrator by an evaluation of the Court of the merits of the documents and the materials on record. If the view of the Arbitrator is a possible view, the reasons in the award cannot be examined. Issues relating to a default in the performance of contractual obligations; of whether time was of the essence and of the assessment of the quantum of damages are issues of fact and it is not open to the Court to interdict an award on such factual issues;[9]

(vii) If the Arbitral Tribunal has committed an error of fact or law in reaching its conclusion on a disputed question submitted for adjudication, the Court would have no jurisdiction to interfere

8 Delhi Municipal Corporation v. M/s. Jagan Nath Ashok Kumar, AIR 1987 SC 2316.
9 Arosan Enterprises Ltd. v. Union of India, AIR 1999 SC 3804 (para 36 page 3819 and para 38 page 3820).

with the award. This would depend upon the reference made to the Arbitrator. In a general reference for deciding a contractual dispute, the Court could interfere if the award is based on an erroneous legal proposition. In a reasoned award, the Court can interfere if on the face of the award, there is an erroneous proposition of law or application. However, if a specific question of law is submitted to the Arbitrator an erroneous decision thereon would not render the award bad unless the Arbitrator has proceeded illegally;[10]

(viii) The Court exercising jurisdiction under Section 30 of the Arbitration Act, 1940 is not entitled to probe the mental processes of the Arbitrator and where no reasons have been furnished as to what impelled the Arbitrator to arrive at his conclusion, the reasonableness of the reasons and the appraisal of evidence are matters which lie in a realm of arbitration. The Court does not take upon itself the task of being a judge on the evidence before the Arbitrator. The error apparent test does not empower the Court to invalidate an award merely because by a process of inference and argument, it may be demonstrated that

10 ONGC Ltd. v. Saw Pipes Ltd. (2003) 5 SCC 705 (para 54 page 736)

the Arbitrator has committed some mistake in arriving at a conclusion;[11]

(ix) An award may be remitted or set aside on the ground that the Arbitrator making it had exceeded his jurisdiction and evidence of matters not appearing on the face of award will be admitted in order to establish whether or not the jurisdiction has been exceeded, because the nature of the dispute is something which has to be decided outside of the award. The Arbitrator having acted beyond jurisdiction is a ground which is different from an error apparent on the face of the award. However, a distinction in such a case must be drawn between an error within the jurisdiction and an error in excess of jurisdiction. While the Court may examine the claims to find out whether they were within the disputes referred to the Arbitrator, it is not open for the Court to find out whether in arriving at the decision, an Arbitrator has acted correctly or incorrectly. Hence, whether a particular amount was liable to be paid or damages liable to be sustained was a decision within the competence of the Arbitrator.[12]

11 Sudarsan Trading Co. v. Govt. of Kerala, AIR 1989 SC 890 (para 29 page 901).
12 Sudarsan Trading (supra) (para 31 page 902).

(x) An Arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. An Arbitrator who travels outside the bounds of the contract, acts without jurisdiction. However, so long as he remains within the parameters of the contract and construes the provisions of the contract, the award cannot be interfered with unless he has given the reasons for the award disclosing an error apparent on the face of it.[13]

(xi) The authority of the Arbitrator is derived from the contract and he commits a misconduct if by his award, he decides a matter excluded by the agreement. A conscious disregard of the law or of the provisions of the contract from which the Arbitrator has derived his authority vitiates the award. An error in the construction of the contract is an error within jurisdiction but an Arbitrator who travels outside the contract commits a jurisdictional error.[14]

12. The challenge to the judgment of the Learned Single Judge, which rejects the Arbitration Petition will have to be

13 Associated Engineering Co. v. Govt.of A.P., (1991) 4 SCC 93 (para 24 page 103)
14 Associated Engineering Co. v. Govt. of A.P., (1991) 4 SCC 93 (paras 25 & 27 page 103 and 104)

adjudicated upon having regard to these settled principles.

Excepted matters :

13. The first submission that has been urged before the Court is that the award of the Arbitrator travels beyond the jurisdiction of the Arbitrator because in entertaining the claims that were referred to him, the Arbitrator has dealt with matters excepted by the arbitration agreement. Clause 26 of the Contract empowers the Arbitrator to adjudicate *inter alia* upon all questions and disputes relating to the meaning of the specifications, instructions, quality of workmanship of the items ordered or as to any other question, claim or thing whatsoever, in any way, arising out of or relating to the supply order "**except where otherwise provided in the supply order/contract**". (emphasis supplied). The question for construction was the extent of the exclusion created by Clause 17(ii) of the Special Conditions. Clause 17(ii) of the Special instructions/conditions confers upon ONGC an option to reject in full or a part of the material or accept it at a reduced rate if the material sampled/bonded is found below specifications on test. The manner in which the material was to be sampled/bonded and tested was inter alia enunciated in clauses 10 and 13 and in

Annexure-A, more particularly clauses 5 and 6 thereof. The question, essentially of the interpretation of clause 17(ii), was whether the finality that would attach to the decision of ONGC applied to the exercise of the option to reject the material in full or in part or to accept the same at a reduced rate on the one hand or whether on the other, the conclusion as to whether the material that was sampled and bonded was found to be below specifications and test would also rest in the final discretion of ONGC. On a plain reading of clause 17(ii), it is apparent that the finality that was attached was to the decision of ONGC on the exercise of the option. An option postulates a choice among competing alternatives. The mode of testing and the result of the test were not a matter of option but determination. The clause of the contract does not render a certification final and conclusive. Whether the material has been sampled or bonded in accordance with the terms of the contract and whether the material was duly tested in accordance with contractual specifications are not evidently matters on which the decision of ONGC is rendered final and binding.

14. In assessing the interpretation to be placed on a clause

which excepts or excludes certain matters from the jurisdiction of the Arbitrator it is important for the Court to have due regard to the nature of the exception and the procedure which the contract enunciates for a decision on one of the excepted matters. Parties to the contract are entitled and do often times stipulate that the decision on one or more matters would be entrusted for certification to a specified authority. The contract will provide the parameters for the exercise of the decision making power thus vested and lay down the limits of the authority conferred. The conclusiveness and binding character that attaches to a satisfaction or certificate of an Architect or an Engineer has been dealt with in Hudson's Building and Engineering Contracts.[15] According to the treatise, the following conditions must exist before a satisfaction or certificate is regarded as conclusive and binding on the parties:

> "(1) The matter in dispute must be one upon which the contract confers jurisdiction on the architect or engineer to express his satisfaction or certify.
>
> (2) The contract must on its true construction provide that the certificate or satisfaction is intended to be binding. In most but not necessarily all building contracts this will be the case bilaterally, that is to say both parties will be bound by the certificate. There are, however, cases, apart from the obvious example of

15 (Tenth Edition 1970 at page 498)

> interim certificates, where the certificate will only bind unilaterally. But in either case a provision enabling a party to go behind or question or dispute the decision will destroy the conclusiveness of the satisfaction or certificate, in particular any applicable arbitration clause.
>
> (3) The certificate or satisfaction must be honestly given. It must be given without collusion, interference or undue influence, and the certifier must preserve his independence and not act in a way that suggests that he has lost his independence.
>
> (4) The provisions of the contract must be strictly adhered to, the approval or certificate must be given by the correct person at the correct time, and must not take into account any matters quite outside the stipulated requirements of the contract, though there may be a class of "unilateral" cases where the certifier may impose a stricter standard, e.g. of quality, on the party bound than the contract documents expressly require.
>
> (5) The employer must have done nothing, by breach of contract or otherwise, to prevent the contractor from obtaining the certificate or satisfaction."

15. In Keating on Building Contracts,[16] the object of conferring finality upon a certificate issued by the Architect has been explained thus:

> "It has been said that the object of making the architect's decision in a final certificate binding and conclusive is to have the benefit of his skill and knowledge as an independent man to decide what is finally due between the parties without recourse to the enormous expense and trouble often involved in a judicial proceeding. But it may be that the court would entertain an application for a

16 (Fifth Edition page 106)

> declaration and other relief if the architect has departed from his instructions in a material respect so that either party would be able to say that the certificate was not binding because he had not done what he was appointed to do."

The decision of the Supreme Court in **Vishwanth Sood vs. Union of India**,[17] involved a case in which clause 2 of the contract provided for compensation for delay. The contract stipulated that the time that was allowed for completing the work would strictly be observed by the contractor and would be deemed to be the essence of the contract. The Contractor was liable to pay as compensation an amount equal to one percent or such lower amount as the Superintending Engineer would decide. The decision of the Superintending Engineer was to be final. The arbitration clause in the contract, Clause 25, provided for a reference to arbitration of all questions and disputes except where otherwise provided in the contract. The Supreme Court held that the words "except where otherwise provided in the contract" could only have a reference to provisions such as those in clause 2 by which "certain types of determinations are left to the administrative authorities concerned". Consequently, the award of compensation

17 AIR 1989 SC 952

under clause 2 would be outside the purview of the Arbitrator. The Supreme Court noted that the Court "had some hesitation in coming to the conclusion" since the exclusion from arbitrability of an important aspect of the contract such as a question of negligence or default on the part of the contractor would have far reaching effect. The Court, however, noted that clause 2 was in the nature of a penalty clause introduced under the contract to ensure that the time schedule was strictly adhered to and in that connection observed thus:

> "We have already pointed out that this is a penalty clause introduced under the contract to ensure that the time schedule is strictly adhered to. It is something which the Engineer-in-charge enforces from time to time when he finds that the contractor is being recalcitrant, in order to ensure speedy and proper observance of the terms of the contract. This is not an undefined power. The amount of compensation is strictly limited to a maximum of 10% and with a wide margin of discretion to the Superintending Engineer who might not only reduce the percentage but who, we think, can even reduce it to nil, if the circumstances so warrant. It is this power that is kept outside the scope of arbitration. We would like to clarify that this decision of ours will not have any application to the claims, if any, for loss or damage which it may be open to the Government to lay against the contractor, not in terms of clause 2 but under the general law or under the Contract Act."

16. In **Food Corporation of India vs. Sreekanth Transport**,[18] the arbitration clause provided an exception as to any

18 (1999) 4 SCC 491

matter, the decision of which was expressly provided for in the contract. Dealing with the clause, the Supreme Court observed as follows :

> " "Excepted matters" obviously, as the parties agreed, do not require any further adjudication since the agreement itself provides a named adjudicator – concurrence to the same obviously is presumed by reason of the unequivocal acceptance of the terms of the contract by the parties and this is where the courts have been found lacking in their jurisdiction to entertain an application for reference to arbitration as regards the disputes arising therefrom and it has been the consistent view that in the event of the claims arising within the ambit of excepted matters, the question of assumption of jurisdiction of any arbitrator either with or without the intervention of the Court would not arise. The parties themselves have decided to have the same adjudicated by a particular officer in regard to these matters; ..."

A similar clause came up for consideration before the Supreme Court in **General Manager, Northern Railway vs. Sarvesh Chopra**.[19] Clause 63 of the General Conditions of Contract provided for certain excepted matters on which the decision would be final and binding. The Supreme Court held that the two decisions in **Vishwanath Sood** and **FCI** ruled that a clause providing a departmental or in-house remedy and attaching finality to the decision therein would be an excepted matter because such

19 (2002) 4 SCC 45

were the clauses of the contract which came up for consideration of the Court. Those decisions, the Supreme Court held, could not be relied upon as authority for the proposition that if a departmental remedy for settlement of a claim was not provided, then the claim would cease to be an excepted matter. The conclusions of the Court were as follows :

> "(i) While deciding a petition under Section 20 of the Arbitration Act, 1940, the court is obliged to examine whether a difference which is sought to be referred to arbitration is one to which the arbitration agreement applies. If it is a matter excepted from the arbitration agreement, the court shall be justified in withholding the reference, (ii) to be an excepted matter it is not necessary that a departmental or an "in-house" remedy for settlement of claim must be provided by the contract. Merely for the absence of provision for in-house settlement of the claim, the claim does not cease to be an excepted matter, and (iii) an issue as to arbitrability of claim is available for determination at all the three stages - while making reference to arbitration, in the course of arbitral proceedings and while making the award a rule of the court."

Whether a particular decision falls within an excepted matter and, whether a particular certificate is conclusive is essentially a question of construction in each case. As **Keating** (supra) places the matter:

> "It is a question of construction in each case to determine whether it was intended that a particular certificate

> should be conclusive upon the matter with which it purports to deal. Beyond this, it is not possible to formulate a comprehensive test to determine whether a certificate is binding and conclusive."

17. The arbitral award in the present case, entered a finding of fact that the loopline test which was actually carried out by ONGC was not in accordance with the terms of the contract. Para 5 of Annexure-A contained a stipulation for evaluating the performance of the material and working out the compensation, if any, for sub-standard quality. The Arbitrator held that the loopline test in the present case, was not carried out by comparing the sample prepared in accordance with amended para 5 of Annexure-A. Consequently, it could not be held that the dispute between the parties regarding the performance of the PPD supplied by DIK to ONGC was excluded from the scope of the arbitration clause. The Learned Single Judge while dealing with the submission that the award dealt with excepted matters held that clause 17(ii) provided that if the material supplied is found to be below specifications and test, ONGC would have an option to reject it in full or part or to accept it at a reduced rate and the decision of ONGC in that regard would be final and binding. The

Learned Single Judge held that the present dispute which mainly pertains to the method of carrying out the loopline test would not fall in the excepted category. In our view, the interpretation placed by the Arbitrator and by the Learned Single Judge on the provisions of clause 17(ii) cannot be said to suffer from error. Clause 17(ii) postulated that it is the decision of ONGC on the exercise of option that would be final and binding. The option related to whether ONGC would (i) reject the material in full or in part; or (ii) accept it at a reduced rate. It was the exercise of that option which was final and binding. Clause 17(ii) does not stipulate a final and binding character to the question as to whether the loopline test was carried out in accordance with the specifications of the contract as agreed upon between the parties.

18. On behalf of ONGC, the Award of the Arbitrator was sought to be faulted on the ground that while on the one hand, an adverse inference was drawn against ONGC for not producing evidence in regard to the alleged additional dosage of PPD that was deployed, the Arbitrator had on the other hand ignored the correspondence which would show that DIK had agreed to joint testing and had accepted at a subsequent stage that there was a

dosage variation. Neither the Learned Single Judge in considering a petition under Section 30 of the Arbitration Act, 1940, nor this Court would be justified in reappreciating the documentary material for the purposes of scrutinising whether the conclusion drawn on the facts of the case by the Arbitrator was or was not justified. However, for the sake of completeness, we have with the assistance of Counsel perused the relevant documentary material that was placed at the hearing. DIK's letter dated 6th February 1990 when read in its totality does not contain an admission that the material which was supplied was inferior. In its letter, DIK reiterated its earlier stand that its product was not inferior or sub-standard to the material which was supplied earlier in accordance with the specifications of ONGC. DIK's contention was that it was as a result of variations at the platform at Bombay High that the loopline test had showed certain variation. Without prejudice to that contention, DIK sought to contend that ONGC was not justified in withholding the amounts which had not been paid under the terms of the contract and the penalty in any event could not exceed Rs.35 lakhs. It was for the Arbitrator to consider the documentary material on the record and to arrive at an appropriate conclusion. This Court particularly sitting in the exercise of its

appellate jurisdiction against the judgment of the Learned Single Judge would not be justified in reappreciating the evidence or in substituting an evaluation by the Arbitrator for an evaluation by the Court. Before concluding this aspect of the matter, it would, however, be necessary to note that it is an admitted position that in the Arbitration Petition that was filed before the Court no ground was pleaded to the effect that the arbitral award dealt with excepted matters. There is no reference in the grounds of the Arbitration Petition to the effect that a dosage variation was accepted by DIK. There is no challenge to the finding of the Arbitrator in the grounds that the reference sample for the purposes of the loopline test was not kept in accordance with the conditions stipulated in para 5 of Annexure-A to the Contract.

Liquidated damages :

19. Clause 20 of the Contract empowers ONGC to levy liquidated damages if the contractor failed to deliver stores or any instalment thereof within the period fixed for such delivery in the schedule. The Arbitrator has entered a finding of fact in para 19 of the award that by implied mutual consent, the time for effecting delivery was extended. The finding of the Arbitrator of a

consensual extension of time is a pure finding of fact which neither warrants interference in the Arbitration Petition nor in appellate proceedings. The Arbitrator, it must also be noted, has found that ONGC failed to establish any damage having been caused on account of the alleged late delivery. The Arbitrator has relied on the judgment of the Supreme Court in **Maula Bux** (supra). In **Saw Pipes** (supra), the Supreme Court after adverting to the provisions of Sections 73 and 74 of the Contract Act held thus:

> "From the aforesaid sections, it can be held that when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss which naturally arises in the usual course of things from such breach. These sections further contemplate that if parties knew when they made the contract that a particular loss is likely to result from such breach, they can agree for payment of such compensation. In such a case, there may not be any necessity of leading evidence for providing damages, unless the court arrives at the conclusion that no loss is likely to occur because of such breach. Further, in case where the court arrives at the conclusion that the term contemplating damages is by way of penalty, the court may grant reasonable compensation not exceeding the amount so named in the contract on proof of damages."

In para 68 of the judgment, the Court summarised its conclusion as follows :

> "(1) Terms of the contract are required to be taken into consideration before arriving at the conclusion

whether the party claiming damages is entitled to the same.

(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

(3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.

(4) In some contracts, it would be impossible for the Court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation."

20. In the present case, the categoric finding of the Arbitrator is that there was no delay on the part of DIK in effecting supplies. ONGC failed to lead any evidence to the effect that it was required to deploy an additional quantity of PPD, though in the course of its answer to the interrogatories it had stated that such material would be produced before the Arbitrator. This was not, therefore, one of

those cases where it would have been impossible for the Arbitrator to assess compensation arising from a breach. However, as a matter of fact, the finding is that there was no breach by DIK. The time for effecting delivery was extended by mutual consent. That being the position, the award disallowing the deduction of liquidated damages cannot be faulted.

21. Finally, in so far as the question of interest is concerned, the Learned Single Judge has observed in paragraph 19 of the judgment that the Arbitration Petition does not contain any challenge to the award of interest with reference to provisions of clause 27 of the Contract. The submission before the Learned Single Judge that the award of interest was in the teeth of the contractual provisions was, therefore, not founded on a plea to that effect in the Arbitration Petition. A challenge to an arbitral award must be founded on cogent pleading. Mr.Justice B.N. Srikrishna (as His Lordship then was), speaking for a Division Bench of this Court in **Vastu Invest & Holdings Pvt. Ltd. vs. Gujarat Lease Financing Ltd**.[20] observed that an Arbitration Petition cannot even be amended after the period of limitation prescribed for challenging

20 (2001) 2 BOM LR 156

the award has expired:

> "The law has been well settled even under the Arbitration Act, 1940, that a ground not initially raised in the petition to challenge the award could not be permitted to be subsequently raised by an amendment, if the application for amendment itself was beyond the period of limitation fixed for filing of the petition, challenging the award."

In the present case, no ground based on the provisions of clause 27 was urged before the Learned Single Judge in the Arbitration Petition. The challenge on that ground, therefore, could not have been advanced. The contention that the award is contrary to the provisions of the contract has already been dealt with while considering the other heads of challenge. No separate submission, other than what is already dealt with, has been urged.

22. In these circumstances, we do not find any reason to interfere with the judgment of the Learned Single Judge in so far as it dismissed the Arbitration Petition challenging the arbitral award. The Appeal shall accordingly, stand dismissed. After the expiry of four weeks, the Bank Guarantees furnished by the Respondent shall be duly discharged and returned by the the Prothonotary & Senior Master. The Appellant shall pay the costs

of the Respondent.

(R. M. S.KHANDEPARKAR, J.)

(DR.D. Y. CHANDRACHUD, J.)